UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,
Ex Rel. Dale Thomas Vosika
and Rob Thompson,

Plaintiffs,

v.

Starkey Laboratories, Inc.,

Defendant.

Civil No. 01-709 (DWF/SRN)

MEMORANDUM OPINION AND ORDER

Robert J. Hajek, Esq., Warchol Berndt & Hajek, 3433 Broadway St. NE, Ste. 110, Minneapolis, MN 55413, counsel for Plaintiffs.

Bradley J. Betlach, Esq., Cynthia P. Arends, Esq., and Janice Marie Symchych, Esq., Halleland Lewis Nilan Sipkinds & Johnson, 220 6th St. S., Ste. 600, Minneapolis, MN 55402, counsel for Defendant.

Introduction

The above-entitled matter came on for hearing before the undersigned United States District Judge on January 23, 2004, pursuant to Defendant Starkey Laboratories, Inc.'s Motion to Dismiss. For the reasons stated below, Defendant's motion is granted.

Background

According to the Amended Complaint, Defendant Starkey Laboratories, Inc. ("Starkey") is a Minnesota corporation headquartered in Eden Prairie, Minnesota. Starkey manufactures and sells hearing aids and accessories, parts, and supplies for hearing aids. Plaintiff Rob Thompson has been employed in various positions at Starkey since April 1991. Currently, Thompson serves as marketing program manager. Plaintiff Dale Vosika was employed by Starkey for approximately 20 years, from 1979 to 1999.

Starkey entered into a contract to sell hearing aids to the Department of Veterans Affairs (the "VA") from October 1, 1994, to September 30, 1996. The contract was amended on March 21, 1996, and extended until September 30, 1997. The contract contained the following provision:

> Price Reduction Clause (I-FSS-390): For the purpose of the Price Reduction Provisions, this contract is predicated on the Government receiving terms better than the terms you offer to your dealers (dispensers).

Plaintiffs assert that, during the contract period, Starkey sold hearing aids to two of its customers, Evans Hearing Aid Center and Trinity Hearing Aid Company, at prices less than the prices fixed in the contract with the VA.

Plaintiffs, as relators, brought this *qui tam* action on behalf of the United States under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, asserting that Starkey failed to rebate price reductions to the VA based upon these lesser-priced sales, and that this failure was part of a "scheme to knowingly charge the [VA] more in relation to its purchases than was charged to Starkey's most favored customers." (Amended Complaint at ¶ 15.) Plaintiffs further assert that the entire amount of each invoice submitted to the VA for hearing aids during the entire contract period resulted in a false and fraudulent claim subject to damages under the False Claims Act. (*See id.* at ¶ 23.)

Starkey has brought this motion to dismiss on two grounds. First, Starkey asserts that Plaintiffs have failed to satisfy the particularity requirements for pleading fraud set out in Fed. R. Civ. P. 9(b) and thus that Plaintiffs' claims are appropriately dismissed. Second, Starkey contends that, pursuant to the False Claims Act's six-year statute of limitations, all claims occurring before December 18, 1995, should be dismissed with prejudice.

Discussion

1. Standard of Review

In deciding a motion to dismiss, the Court must assume all facts in the Complaint to be true and construe all reasonable inferences from those facts in the light most favorable to the complainant. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The Court grants a motion to dismiss only if it is clear beyond any doubt that no relief could be granted under any set of facts consistent with the allegations in the Complaint. *Id.* The Court may grant a motion to dismiss on the basis of a dispositive issue of law. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). The Court need not resolve all questions of law in a manner which favors the complainant; rather, the Court may dismiss a claim founded upon a legal theory which is "close but ultimately unavailing." *Id.* at 327.

2. Rule 9(b) Particularity

The False Claims Act imposes liability on "[a]ny person who knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a). "A complaint alleging violations of the False Claims Act must be pled with particularity pursuant to Rule 9(b)" of the Federal Rules of Civil Procedure. *United States ex rel. Costner v. U.S.*, 317 F.3d 883, 888 (8th Cir. 2003) (citing *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 308 (5th Cir. 1999)). With this standard of particularity in mind, the claim must identify "who, what, where, when, and how." *Id.* (citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997)).

Starkey asserts that Plaintiffs have failed to plead their False Claims Act claims with sufficient particularity to satisfy the requirements of Fed. R. Civ. P. 9(b). Specifically, Starkey contends that Plaintiffs have failed to name the people involved with the alleged false claims, the dates that these claims occurred, the number of violations, the terms of the sales, and why the submissions of these payments were knowingly wrong.

The Court agrees that Plaintiffs' claims lack sufficient particularity to satisfy Rule 9(b). Plaintiffs' claims of a corporate scheme to intentionally submit false claims to the government relate to a period that ranges from October 1, 1994, to September 30, 1997. Plaintiffs have not stated the specific timing of Starkey's alleged lower-priced sales to its two other customers, the number of allegedly lower-priced sales that occurred, the timing of the alleged submissions of false claims to the government, or the identity of the employees responsible for the allegedly fraudulent claims to the government. Without this information, the Defendants are left unable to respond with documents and witnesses to testify as to whether such incidents occurred. The Amended Complaint is "'not specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.'" *See United States ex rel. Costner*, 317 F.3d at 889 (quoting *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1051-52 (9th Cir. 2001)). To remedy this inadequacy, the Court will dismiss Plaintiffs' claims without prejudice and allow the Plaintiffs 30 days from the date of this Order to respond with a Second Amended Complaint that more specifically delineates the alleged fraudulent conduct.

3. Statute of Limitations

Because the Court has determined that Plaintiffs' claims fail for lack of particularity at this time, the Court declines to rule on Defendant's Motion to Dismiss insofar as it seeks a declaration from the Court as to the effect of the False Claims Act's statute of limitations on Plaintiffs' claims. Once Plaintiffs have filed a Second Amended Complaint, if it is in Defendant's view that Plaintiffs' claims still fall outside of the six-year statute of limitations prescribed by the False Claims Act, the Court will give calendar priority to hear Defendants' renewed motion to dismiss on this issue.

For the reasons stated, **IT IS HEREBY ORDERED THAT:**

1. Defendant's Motion to Dismiss (Doc. No. 24) is **GRANTED IN PART** and **DENIED IN PART**, as follows:

a.. Defendant's Motion to Dismiss is **GRANTED** as to Defendant's assertion that the Amended Complaint lacks the specificity required under Fed. R. Civ. P. 9(b). Accordingly, the claims in Plaintiffs' Amended Complaint (Doc. No. 11) are **DISMISSED WITHOUT PREJUDICE**. Plaintiffs may refile a Second Amended Complaint that meets the particularity requirements of Fed. R. Civ. P. 9(b) within 30 days of this Order.

b. The Court declines to rule on Defendant's Motion to Dismiss insofar as it seeks a ruling on the effect of the False Claims Act's statute of limitations on Plaintiffs' claims.

Dated: February 20, 2004

s/DonovanW. Frank
DONOVAN W. FRANK
Judge of United States District Court